Supreme Court, U.S.
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No. 00-700

IN THE
Supreme Court of the United States

ROBERT K. GRAY,

Petitioner,

v.

ST. MARTIN'S PRESS, INCORPORATED
and SUSAN TRENTO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

The parent company of Respondent St. Martin's Press, Incorporated, is St. Martin's Enterprises, Inc., and no publicly held company owns 10% or more of the stock of St. Martin's Press, Incorporated.

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INTRODUCTION

The First Circuit's unanimous decision affirming the dismissal of Petitioner's libel claims constitutes a straightforward application of settled First Amendment principles that, over the past three decades, have been repeatedly reaffirmed by this Court. Beyond question, the First Circuit properly held that, under established Supreme Court precedent, a public figure libel plaintiff must show "actual malice" to prevail and that, additionally, a statement must contain or imply a provably false factual assertion to be actionable. Nothing in the Petition indicates a basis for review of the lower courts' application of these firmly established First Amendment standards.

The first question presented — in which Gray now argues that the actual malice standard should be abandoned in limited purpose public figure libel cases in favor of a "professional negligence" test — was never raised by Gray in the proceedings below or considered by the lower courts. The question is therefore not appropriate for Supreme Court consideration under this Court's prudential rules of practice. Similarly, because the First Circuit determined that there was a public controversy regarding Washington lobbyists "continuing up to the book's publication" in 1992 and that "Gray was a central figure in this controversy," it did not reach (or express any view on) Gray's legal argument that public figure status should lapse where — unlike here — a plaintiff is no longer in the public eye at the time of the disputed publication. Since the First Circuit's unchallenged factual determination obviated any need to reach Gray's "passage of time" argument, Gray's second question presented is also not properly before the Court on this record. Lastly, the third question presented is merely a demonstrably incorrect assertion by Gray that the First Circuit failed to consider tenor and context in determining that Statement (b) does not state or imply a provably false fact.

This case presents no conflict in the circuits, nor any departure from judicial precedent, nor any other compelling reason to grant the Petition under Supreme Court Rule 10. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

This libel action arises from a book, entitled *The Power House* (the "Book"), that was written by Respondent Susan Trento and published by Respondent St. Martin's Press, Incorporated ("St. Martin's") in July 1992. A 873.[1] The Book describes the operation of well-connected Washington lobbyists and their influence on our government, focusing on the professional activities of Gray as the then most prominent lobbyist in the nation. Trento spent more than two years researching the Book and conducted interviews with more than 100 people, including "lobbyists and public relations professionals, government officials, legislators, clients of Gray's, friends and competitors." Book at xi; A 870-871.

A. Petitioner Robert Gray

As found by the District Court, "Robert K. Gray has lived in the public's eye for over three decades."[2] He has been described in news articles as "one of the nation's most

1. In this Brief, "A" refers to the Appendix submitted by the parties to the First Circuit. The District Court's opinion of March 5, 1998 is referred to herein as "1998 D. Ct. Op." and the District Court's opinion of May 19, 1999 is referred to as "1999 D. Ct. Op.," followed by page cites to the Appendix accompanying the Petition, where the opinions are reproduced. The Court of Appeals' opinion of August 2, 2000 is referred to as "Ct. App. Op.," followed by page cites to the Appendix to the Petition. "Pet" refers to the Petition for Writ of Certiorari.

2. *See* District Court order of September 30, 1997 at 2, which is reproduced in the Addendum to Plaintiff-Appellant's Brief in the Court of Appeals.

powerful lobbyists," a "lobbying and public-relations legend," a "professional self-promoter" and a "limelight-aholic" who has publicly credited himself with "bringing lobbying out of the closet." A 308, 319, 348, 417, 424.

From 1961 to 1981, Gray was the director of the Washington, D.C. office of Hill & Knowlton, one of the world's largest public relations and lobbying firms. He then founded, and from 1981 to 1986 was the Chairman of, Gray and Company Public Communications, International, which was one of Washington's most prominent and visible lobbying firms. A 38, 319. Gray subsequently served as Chairman and Chief Executive Officer of Hill & Knowlton from 1986, when he sold his company to Hill & Knowlton, until 1993. A 38.

In tandem with his government lobbying activities, Gray was for many years active in Republican party politics. In 1980, he served as Director of Communications for the Reagan-Bush campaign and, in 1981, as Co-Chairman of the Reagan Inauguration. A 319-21. He also professed in a 1996 *Miami Herald* op-ed piece to having served the White House during the Reagan years as a "spin-doctor." A 500.[3]

Gray has repeatedly entered the public arena to promote his brand of lobbying and himself. *E.g.*, A 307-308, *Forbes*, "*The Gray Eminence*"; A 490-92, *Time*, "*How Top Lobbyist Bob Gray Makes Friends and Sells Influence*"; A 309-311, *The Washington Post*, "*Robert Gray's Lobbyists: Turning Washington's Wheels.*" By the time the Book was published in 1992, he had been discussed, photographed and featured

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3. Even before beginning his career as a lobbyist, Gray held positions in the White House for six years, first as Special Assistant to President Eisenhower, then as Appointments Secretary to the President, and finally as Secretary of the Cabinet. A 38. Gray sought attention for his White House experiences by authoring a book entitled *Eighteen Acres Under Glass*. A 425.

in more than 460 magazine and newspaper articles, including numerous cover stories and lead articles, and had participated in interviews about virtually every aspect of his lobbying activities and business. A 302-514. He had appeared on national television programs, such as *The Today Show* and other news programs, and was the subject of a CNN documentary. A 331, 499. He authored a 1986 *New York Times* op-ed piece entitled *In Defense of Lobbyists*, and from 1986 through 1992 alone was featured or mentioned in at least 188 news stories. A 493, 360-375. *E.g.*, A 434, *The Washington Post*, "*Image Conscious*," Oct. 5, 1992 (Gray is "well-known for courting the media and using it in unabashed promotion").

For years, Gray and his high-profile style of lobbying were at the epicenter of national debate over the influence and activities of lobbyists.[4] Among other topics of concern, in the 1980s and 1990s there was sustained public criticism over the billing practices of Gray, his companies and other lobbyists and over whether their clients really got the government access they so handsomely paid for. *E.g.*, A 453, *Newsweek*, "*The Real Price of Buying Influence*," Jan. 13, 1992 ("[b]eware . . . Washington lobbyists . . . regularly milk clients. . . . [S]everal former employees of Hill & Knowlton and Gray and Co. . . say that there has been intense pressure over the years to rack up billable hours"); A 476, *The New Republic* ("Robert K. Gray . . . hype[s] [his] connections and sells them for exorbitant fees to any cause, foreign or domestic");

4. *E.g.*, A 331, *The National Journal* ("without a doubt Gray and Co. is Washington's most controversial public relations firm"); A 359, *Time* (criticizing Gray for "overselling businessmen on his ability to solve all their Washington problems with a few phone calls"); A 307-308, *Forbes*, "*The Gray Eminence*" (Gray is a "limelight-aholic, a lot like a political person," who has "built a successful business . . . [on] access and influence"); A 454, *Newsweek* ("Gray rose to the top of his profession in part because clients heard he was friends with the Reagans").

A 323, *Time*; A 315, *The Washington Post*. Consistent with his credo of "bringing lobbying out of the closet" (A 319), Gray served as an outspoken defender of the lobbying industry in this public controversy over its billing and business practices.[5]

B. Procedural History of this Lawsuit

On June 2, 1995, almost three years after the Book's publication, Gray sued Trento and St. Martin's in the District of New Hampshire for libel based on eight passages in the 430-page Book. A 37-43. In June 1997, after two years of discovery, St. Martin's moved for summary judgment on various grounds as to each of the eight passages in suit. A 15.[6]

On March 5, 1998, the District Court denied summary judgment as to five of the passages, but dismissed Statement (b) and two other passages on the ground that they were not capable of being proven true or false. 1998 D. Ct. Op. at 46a. The parties thereafter completed discovery and, in February 1999, defendants filed an additional summary judgment motion seeking a determination that Gray was a public figure and the dismissal of the remaining five passages in suit on the ground that they were not published with "actual malice." A 28.

In its second summary judgment decision, dated May 19, 1999, the District Court ruled that Gray was a

5. *E.g.*, A 454, *Newsweek*, Jan. 13, 1992 ("I'd have the best employee's head if I found him dumping hours on a client with no work"); A 491, *Time* ("today's lobbyist has to be a straight shooter"); A 402-403, *Washington Business Journal* ("I think lobbyists are as honest as any group I know"); A 493, Robert K. Gray, *The New York Times*, "*In Defense of Lobbyists.*"

6. The eight passages, which have been designated in this proceeding as Statements (a) through (h), are set forth in the Addendum to the Court of Appeals decision. Pet. at 17a-19a. Only Statements (b) and (c) are relevant to Gray's Petition for Writ of Certiorari. Pet. at 2, 4 n.3.

"limited purpose public figure" as to his lobbying activities and, as such, was required to prove actual malice. 1999 Dist. Ct. Op. at 26a-27a. The District Court then denied summary judgment as to four of the remaining passages, but dismissed Statement (c), which was a quote from a former Gray and Company executive that there was "an awful lot, to me, of overcharging" at Gray and Company. Pet. at 28a. As to this statement, the District Court concluded that no reasonable trier of fact could find by clear and convincing evidence that Statement (c) was published by either Trento or St. Martin's with actual knowledge of its falsity or reckless disregard for whether it was false. 1999 Dist. Ct. Op. at 29a.[7]

In reaching this conclusion, the District Court noted that Statement (c) was a verbatim, tape-recorded quote from Barry Zorthian, who had been a Senior Vice-President at Gray and Company and who had also held other important positions of responsibility, including President and Chairman of Time Life Broadcast. 1999 Dist. Ct. Op. at 29a; A 874-75, 902, 1199-1201. As the District Court found, however, Trento did not rely on Zorthian alone. 1999 Dist. Ct. Op. at 29a. She also obtained independent corroboration of Zorthian's "overcharging" statement from her interviews with two other senior executives of Gray and Company[8],

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7. Statement (c) reads in full:

> I think there's a degree of venality on the part of [Gray] and lack of integrity which always took me aback. A lot of it he would justify as being a businessman, but there was very little real basic principle and an awful lot, to me, of overcharging. Pet at 18a.

8. A 909-911, *Tape Recorded Interview of Carter Clews, former Senior Vice President of Gray and Company* ("Anytime a client had money, you'd see hours pop up from no where. . . . I remember Frank [Mankiewicz, the head of Gray and Company's Public Relations (Cont'd)

from a book written by a former Gray and Company executive [9] and from news articles about Gray and Company's billing practices that were published by credible national news organizations such as *Newsweek*, *Time* and *The Washington Post*.[10] 1999 Dist. Ct. Op. at 29a; A 876-877. In addition to these multiple sources, Trento also repeatedly sought to interview Gray, but he declined all her requests (although he did provide, through his attorney, written answers to some of Trento's questions). A 690-71, 1154-55. In his Petition, Gray fails to apprise the Court of any of these facts.[11]

(Cont'd)
Division] pointed out that no phone call takes less than one hour, always keep that in mind, he said. Once you pick up the phone, that's one hour, it doesn't matter how long you talk. That is the kind of thing they'd do. . . . [Gray] bought wine at Christmas for all the clients and then billed them for it plus a mark up."). *See also* A 913, *Tape Recorded Interview of Alejandro Orfila, former President of the Organization of American States and former President of the International Division of Gray and Company.*

9. A 876-77, Joan Braden, *Just Enough Rope* (1989) ("The Canadian account was a bottom line account. Everybody who could fancy the slightest reason for piling on, piled on. . . . Why were six people from the press department [of Gray and Company] attending a conference in Ottawa? Why not two people or one person?").

10. A 914, *Newsweek*, "*The Real Price of Buying Influence*," Jan. 13, 1992 ("A former Gray & Co. consultant recalls a colleague including on his 'billable hours' time sheet for one account the hours he spent — more than $1,000 worth — looking for a gift for a client"); A 916, *Time*, "*Pitchman of the Powerhouse*," April 30, 1984 ("Says a former [Gray and Company] employee: 'Suddenly at the end of the month, the client is hit with a $40,000 to $50,000 bill. He says, 'My God, what have I gotten for this?'"); A 920, *The Washington Post*, "*Inside the Power House*," June 28, 1984.

11. In addition, pursuant to Supreme Court Rule 15(2), Respondents point out that pages 7 through 9 of the Petition are riddled with misstatements and rhetorical assertions that have no support in the record. To take but a few examples, Gray asserts that Zorthian had "no involvement or direct knowledge about the billing

(Cont'd)

A two-week jury trial was thereafter held on the four passages that the District Court found presented issues of fact, including a statement by a former Gray and Company

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(Cont'd)
practices of Gray & Company." Pet. at 7. The record shows, however, that as a senior officer of the company, Zorthian was plainly in a position to know about its billing practices and, in fact, provided Trento with specific examples of excessive billing by Gray and Company. A 875, 900-901, 903. Moreover, the record contains no evidence that — as Petitioner claims — Trento "purposely avoided" speaking to sources "whom she believed would offer evidence contrary to . . . Zorthian." Pet. at 11. Similarly, Petitioner's assertion that Trento "acknowledged her preference to seek out disgruntled witnesses to help her make her case against the plaintiff" (Pet. at 8) is not an accurate statement of the record. Additionally, John Lawler — the "person" referred to in the second bullet point on page 8 of the Petition — merely stated that he had "never heard" about overcharging. A 193. He did not in any manner contradict the specific instances of overcharging provided by Trento's multiple sources; he did not make any "exculpatory statement" about overcharging; and it was Lawler himself who Trento found to be a "waste of time" because of his "gladhanding superficial[ity]" and evasiveness. *Compare* A 223 with Pet. at 8. Lastly, there is no evidence in the record to support Gray's misstatement that Trento "*knew*" James Jennings and Charles Crawford "to be key witnesses . . . about Gray and Company's billing practices." Pet. at 8 (emphasis added).

As to St. Martin's, there is no evidence that supports Gray's misstatements that St. Martin's "knew from the outset that [Zorthian] . . . could not be trusted" or that "no effort [was made] to verify Zorthian's [overcharging] statement." Pet. at 8, 9. As set forth in the affidavit of the outside counsel (Paul Sleven) who conducted a lengthy pre-publication legal review of the Book on St. Martin's behalf, "I found that the Gray and Company Senior Vice President's opinion that Mr. Gray overcharged was corroborated by a great deal of highly credible evidence from other sources," including "several officers of Gray & Co. who were in a position to be familiar with Gray & Co.'s billing practices." A 524, 526-28, 1157. Similarly, the record is barren of any evidence that St. Martin's editorial staff "expressed concerns about . . . inaccuracies" in the Book or believed that Trento's two years of research was "sketchy." Pet. at 9.

executive (Statement (d)) that Gray had "[t]otally fabricated" and "stage-managed impressive sounding calls" from White House officials. 1999 Dist. Ct. Op. at 30a. On June 22, 1999, the jury returned special verdicts in favor of Trento and St. Martin's finding that, as to each of the four passages, Gray had failed to prove that Repondents had published to third parties statements about Gray that were false and defamatory. A 672, 674-76, 1291.[12]

C. The First Circuit Decision

In an opinion issued on August 2, 2000, the United States Court of Appeals for the First Circuit affirmed the District Court's grants of summary judgment in all respects. *Gray v. St. Martin's Press*, 221 F.3d 243 (lst Cir. 2000).

Applying de novo review, the First Circuit agreed with the District Court that Gray was a limited purpose public figure with respect to his lobbying activities (and, hence, required to show actual malice as to Statement (c)). Ct. App. Op. at 11a-12a (citing *Gertz v. Robert Welch*, 418 U.S. 323, 351-52 (1974)). In his brief to the First Circuit, Gray alternatively argued that, even if he had been a limited purpose public figure through 1986, he was no longer "the focus of media attention" when the Book was published in 1992, relying on the fact that out of 188 articles discussing him after 1986, "*only*" 11 mentioned him in a *headline*. Plaintiff-Appellant's Brief at 27-29 (emphasis added). The First Circuit rejected this factual contention, finding that "the record shows numerous articles concerning Gray, his company and Hill and Knowlton published between 1986

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12. While the jury's finding of no liability on the common law elements of Gray's libel claims made it unnecessary to proceed any further, the jury also found that Gray had failed to prove actual malice by clear and convincing evidence as to either Trento or St. Martin's. A 673, 674-76.

and 1992." Ct. App. Op. at 12a, n.3. Having found that Gray remained a limited purpose public figure "up to the book's publication" (*id.* at 11a), the First Circuit did not address or express any view on Gray's legal argument that public figure status should lapse where — unlike here — the plaintiff is no longer in the public eye at the time of the disputed publication.

The First Circuit also agreed with the District Court's assessment that no reasonable jury could find that either Trento or St. Martin's had published Statement (c) with actual knowledge of falsity or "a high degree of awareness of . . . probable falsity." Ct. App. Op. at 13a (quoting *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 688 (1989) (internal quotation omitted)). As to Trento, the court found that Zorthian's alleged hostility against Gray did "not preclude reliance" on Zorthian as a source, particularly since several other sources connected with Gray and Company had corroborated Zorthian's claim of overcharging. Ct. App. Op. at 13a-14a. The court also held that Gray's allegation that Trento *should have* interviewed two additional employees who would have denied such overcharging was not evidence of recklessness since "Trento already had multiple sources and was under no obligation to exhaust every possible witness before winding up her investigation." *Id.* at 14a.[13]

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13. Likewise finding no actual malice by St. Martin's, the First Circuit rejected Gray's argument that St. Martin's should have doubted Trento's accuracy because, two years before the Book's publication, Gray's attorney had sent correspondence to St. Martin's objecting to Trento's initial written *"proposal"* for a book about Gray. Ct. App. Op. at 14a. The court noted that, not only was there no claim in this correspondence that the subject matter of Statement (c) was false, "[b]ut the proposal was followed by more than two years of research and there is no evidence that St. Martin's employees doubted the accuracy of Trento's final product." *Id.*

Finally, Statement (b) — in which a Gray and Company executive expressed his view that Gray "faked his closeness" with President Reagan and other senior administration officials — was held by the First Circuit to constitute a non-actionable statement of opinion because it did not "present or imply the existence of facts that can be proven true or false." Ct. App. Op. at 4a-5a (citing *Milkovich v. Lorraine Journal Co.*, 497 U.S. 1, 18-20 (1990)). In so holding, the court stated that whether calling something a "fake" asserts an objective fact "depends very much on what is meant and therefore on context." Ct. App. Op. at 6a. Here, the First Circuit found that the "book made quite clear" that Gray did, in fact, have personal and professional relationships with President Reagan and other senior administration officials. *Id.* at 6a; Book at 154 ("Gray was friends with Ronald Reagan, Ed Meese, Cap Weinberger, Richard Schweiker, Charles Wick and others in the administration"); *see also* Book at 30, 68, 89, 134-35, 155, 168, 177, 340-46. The First Circuit therefore held that, in context, Statement (b) was merely the speaker's subjective view that Gray tended to exaggerate the degree of his "closeness" with President Reagan and others, a "subjective judgment" that was too "vague" to be capable of verification. Ct. App. Op. at 6a-7a.

REASONS FOR DENYING THE WRIT

I. PETITIONER OFFERS NO MERITORIOUS REASON FOR OVERTURNING DECADES OF PRECEDENT PROTECTING THE PUBLICATION OF STATEMENTS MADE WITHOUT ACTUAL MALICE IN PUBLIC FIGURE LIBEL CASES

More than 30 years of Supreme Court and circuit court precedent have firmly established the constitutional principle that a public figure libel plaintiff must show actual malice to prevail on his claims. Petitioner asks this Court

to reverse the outcome of this libel action by simply overruling *New York Times v. Sullivan* and its progeny in *all* limited purpose public figure cases. Pet. at 5. The Court should decline Petitioner's invitation to dislodge decades of First Amendment jurisprudence.

A. Petitioner's First Question Is Not Appropriately Before This Court Since It Was Neither Raised Below Nor Considered By The Lower Courts

As a threshold matter, Petitioner's argument that the actual malice standard should be replaced with a "professional negligence" test is not an appropriate question to be reviewed in this case. This argument was never presented by Petitioner in the proceedings below or passed on by the lower courts. In fact, contrary to his current argument, Petitioner expressly acknowledged in his First Circuit brief that "[t]o recover in a defamation action, a limited purpose public figure must prove by clear and convincing evidence that the defendant published the defamatory statement with actual malice. . . ." Plaintiff-Appellant's Brief at 30.

This Court has frequently held that, "[a]bsent exceptional circumstances," it will not consider questions that were not raised or ruled upon in the lower federal court proceedings. *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).[14] This prudential restriction on the Court's certiorari jurisdiction furthers several important policies, including the Court's "own need for a properly developed record on appeal." *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). *Accord Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) ("questions not raised

14. *E.g., Taylor v. Freeland & Kronz*, 503 U.S. 638, 645 (1992); *Patrick v. Burget*, 486 U.S. 94, 99 n. 5 (1988); *McGoldrick v. Campagnie Generale*, 309 U.S. 430, 434 (1940) ("it is . . . the settled practice of this Court . . . that it is only in exceptional cases . . . that it considers questions argued by a petitioner or appellant not pressed or passed upon in the lower courts").

below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind"). Moreover, the Court "adhere[s] scrupulously" to its customary rule against considering questions not raised or ruled on below particularly where, as in this case, the Petitioner is requesting the Court to modify "an existing constitutional right" or decide a question of "great public importance." *Illinois v. Gates*, 462 U.S. 213, 221, 224 (1983) (declining to consider whether the federal exclusionary rule should be modified where the question was "not pressed or passed upon" in the courts below); *see also Mishkin v. New York*, 383 U.S. 502, 512-13 (1966). The Court's policy of refusing to consider arguments for modification or abolition of constitutional precedents that were not pressed or passed on below "promote[s] respect for the procedures by which [the Court's] decisions are rendered, as well as confidence in the stability of prior decisions." *Gates*, 462 U.S. at 224.

In his Petition, Gray seeks to overturn what, by any measure, constitutes a bedrock constitutional principle. His failure to have raised such an important question below and the lack of any lower court decision on the issue alone dictate that certiorari be denied.

B. This Court has Repeatedly Reaffirmed That The Actual Malice Standard Strikes The Correct Balance Between Freedom of Speech and Reputational Interests In Public Figure Cases

Petitioner asks this Court to discard decades of carefully crafted constitutional jurisprudence on the ground that the "actual malice standard has evolved into a barrier nearly impossible to overcome" and "encourages sloppy journalism." Pet. at 5, 10. Not only are these assertions without foundation, but this very case illustrates the significant First Amendment principles that have animated

this Court's adoption, and repeated reaffirmance, of the actual malice standard in public figure libel cases.[15]

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court fashioned a constitutional rule intended to free criticism of public officials from the restraints imposed by the common law of defamation. Recognizing that "erroneous statement is inevitable in free debate," the Court adopted the actual malice standard to provide "breathing space" for freedom of expression and to safeguard our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." 376 U.S. at 272, 270.

Three years later, in *Curtis Publishing Co. v Butts*, 388 U.S. 130 (1967), a majority of the Court determined:

> that the *New York Times* test should apply to criticism of "public figures" as well as "public officials." The Court extended the constitutional privilege announced in that case to protect defamatory criticism of nonpublic persons who "are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."

Gertz, 418 U.S. at 336-37 (quoting *Butts*, 388 U.S. at 164 (Warren, C.J., concurring in result)). As explained by Chief Justice Warren in concurrence, "[o]ur citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.' " *Butts*, 388 U.S. at 164.

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15. Petitioner's first question does not challenge the correctness of the lower courts' application of the actual malice standard to the facts of this case (perhaps in recognition that, under Supreme Court Rule 10, certiorari is "rarely granted" to review an asserted "misapplication of a properly stated rule of law").

In the more than 30 years since *Butts* was decided, this Court has consistently reaffirmed that the actual malice standard "defines the level of constitutional protection appropriate to the context of defamation of a public person." *Gertz*, 418 U.S. at 342.[16] As Chief Justice Warren presciently observed in words that could describe Petitioner and his lobbying activities, as decision making in our society becomes more and more diffuse, with a "blending of positions and power" between the public and private

16. *E.g.*, *Masson v. New Yorker Magazine*, 501 U.S. 496, 510 (1991) ("[t]he First Amendment limits [state] libel law in various respects. When, as here, the plaintiff is a public figure he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice . . ."); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) ("*The New York Times-Butts-Gertz* culpability requirements . . . ensure that debate on public issues remains 'uninhibited, robust and wide-open'"); *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 666 (1989) ("[t]oday, there is no question that public figure libel cases are controlled by the New York Times standard"); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) ("we have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made 'with knowledge that it was false or with reckless disregard of whether it was false or not'"); *Anderson v. Liberty Lobby*, 477 U.S. 242, 244 (1986) ("[t]hese New York Times requirements [of showing actual malice by convincing clarity] we have since extended to libel suits brought by public figures as well"); *Philadelphia Newspaper v. Hepps*, 475 U.S. 767, 773 (1986) ("[t]he standards of New York Times apply not only when a public official sues a newspaper, but also when a 'public figure' sues a magazine or news service"); *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 163-64 (1979) ("the Court [has] extended the New York Times standard to 'public figures'"); *Hutchinson v. Proxmire*, 443 U.S. 111, 133-134 (1979); *Herbert v. Lando*, 441 U.S. 153, 159 (1979) (the actual malice standard "has been repeatedly reaffirmed as the appropriate First Amendment standard applicable in libel actions brought by public officials and public figures"); *Time v. Firestone*, 424 U.S. 448, 453 (1976).

sectors, non-governmental public figures "often play an influential role in ordering society." *Butts*, 388 U.S. at 163-164. So too, like public officials, public figures — and especially Petitioner —typically enjoy easy access to the media to respond to criticism and, "more importantly," have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood" by "invit[ing] attention and comment." *Wolston*, 443 U.S. at 164 (quoting *Gertz*, 418 U.S. at 345). Application of the actual malice standard to criticism of public figures therefore safeguards the fundamental First Amendment freedom to speak out on matters of public concern involving those who, with "vigor and success . . . [,] seek the public's attention." *Gertz*, 418 U.S. at 323.

These animating principles are exemplified by this very case, where Petitioner, through his highly publicized and often controversial public relations and lobbying activities, functioned "a lot like a political person" (A 307-308) and was intimately involved in influencing domestic legislation, foreign policy and executive action — issues of paramount public concern that go to the core of our democratic process. *E.g.*, A 307-308, 309, 313-14, 319, 323, 332, 345-47, 423, 428-30, 455-57, 463-64, 500, 513-14, 572-73. As Chief Justice Warren recognized over 30 years ago in extending the actual malice standard to public figures, "[i]ncreasingly in this country, the distinctions between governmental and private sectors are blurred." *Butts*, 388 U.S. at 163. And as more power and influence over events of societal concern devolve to the private sector, the need to protect discussion of non-governmental public figures has, if anything, increased.

Petitioner does not seriously challenge the rationale and underpinnings of the actual malice standard in public figure cases. Instead, he asserts two consequences that he argues merit reconsideration of the rule.

Petitioner's first assertion — that the actual malice standard encourages journalists and publishers "to avoid review or verification of the information contained in their reports" (Pet. at 11) — is little more than rhetoric and, in fact, is contradicted by the record in this case. Although Zorthian, as a senior officer of Gray and Company, was himself in a position to know about the company's billing practices (and gave Trento specific examples), Trento did not end her newsgathering there. A 874-75. She investigated further, and independently verified Zorthian's overcharging claim with highly credible evidence from many other sources, including three other Gray and Company officers and national news reports. A 874-77, 901-911, 913, 914, 916, 920. Contrary to Petitioner's claim of "purposeful avoidance" (Pet. at 11), she also repeatedly attempted to interview Petitioner — but he refused. A 869-71, 1154-55. Her manuscript and source materials were then submitted to St. Martin's legal counsel, who conducted a meticulous "sentence by sentence" pre-publication legal review of the Book — including Statement (c) — that comprised some 207 hours over 48 separate days. A 523-525, 526-528. This is hardly evidence of "sloppy journalism," and belies Petitioner's suggestion that the protection afforded by the actual malice standard has led to an erosion of the standards adhered to by professional journalists, authors and publishers.[17]

Equally exaggerated is Petitioner's assertion that "[the] actual malice standard has evolved into a barrier

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17. Much of Petitioner's rhetoric about reporters and the press appears to come from a law review article, Philip L. Judy, *The First Amendment Watchdog Has a Flea Problem*, 26 Cap. U. Law. Rev. 541 (1997). Like Petitioner's arguments here, this law review article is devoid of any evidence or data that the actual malice standard promotes "shoddy journalistic practices" or "publication of inaccurate material." Pet. at 11, 9. In fact, quite the opposite, the article notes that "[m]any editors and reporters state that . . . professional standards . . . control the editorial process." Judy at 562-563.

nearly impossible to overcome." Pet. at 5. This claim is belied by numerous cases in which appellate courts applying the actual malice standard have affirmed, in whole or in part, damage awards in defamation actions brought by public figures or public officials.[18] As this Court has previously observed, while the actual malice test provides "breathing space" for robust debate, this "does not mean that any speech about a public figure is immune from sanction in the form of damages." *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988); *see also Harte-Hanks*, 491 U.S. at 657 (affirming finding of actual malice in public figure libel action).

Finally, Petitioner's suggestion that this Court replace the actual malice standard with a "professional negligence"

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18. *E.g.*, *Eastwood v. National Enquirer*, 123 F.3d 1249 (9th Cir. 1997) (applying actual malice standard to claims for misrepresentation, invasion of privacy and misappropriation); *Crane v. Arizona Republic*, 108 F.3d 337 (9th Cir. 1996); *Rassam v. Yousef*, 92 F.3d 1181 (4th Cir. 1996); *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988); *Gertz v. Robert Welch*, 680 F.2d 527 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983); *Beal v. Bangor Publishing Co.*, 714 A.2d 805 (Me. 1998); *Prozeralik v. Capital Cities Communications*, 222 A.D.2d 1020 (N.Y. 4th Dep't 1995), *leave denied*, 672 N.E. 2d 605 (N.Y. Ct. App. 1996); *Sprague v. Walter*, 656 A.2d 890 (Pa. Super. Ct. 1995); *Hinerman v. Daily Gazette Co.*, 423 S.E. 2d 560 (W.Va. 1992), *cert. denied*, 507 U.S. 960 (1993) (affirming verdict for plaintiff under actual malice standard, while going on to hold plaintiff was not a public figure); *Henrichs v. Pivarnak*, 588 N.E. 2d 537 (Ind. Ct. App. 1992); *Ball v. E.W. Scripps Co.*, 801 S.W. 2d 684 (Ky. 1990), *cert. denied*, 499 U.S. 976 (1991); *DiSalle v. P.G. Publishing Co.*, 544 A.2d 1345 (Pa. Super. Ct. 1988), *cert. denied*, 492 U.S. 906 (1989); *Stickney v. Chester County Comms., Ltd.*, 522 A.2d 66 (Pa. Super. Ct. 1987); *News Publishing Co. v. DeBerry*, 321 S.E. 2d 112 (Ga. Ct. App. 1984), *cert. denied*, 471 U.S. 1053 (1985); *Newson v. Henry*, 443 So.2d 817 (Miss. 1983); *Williamson v. Lucas*, 304 S.E. 2d 412 (Ga. Ct. App. 1983); *Embrey v. Holly*, 442 A.2d 966 (Md. 1982).

test has been previously and emphatically rejected by the Court as inconsistent with the very First Amendment values that require a heightened fault standard in public figure and public official libel cases. As Justice White observed in *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968):

> Concededly the [actual malice] standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But New York Times and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. . . . We adhere to this view and to the line which our cases have drawn between false communications which are protected and those which are not.

Accord Harte-Hanks, 491 U.S. at 666 ("there is no question that public figure libel cases are controlled by the New York Times standard and not by the professional standards rule").

This Court has frequently held that, under the doctrine of stare decisis, the overruling of constitutional precedent "demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1992). Petitioner has offered no reason remotely sufficient to warrant the extraordinary step of discarding the actual malice standard in limited purpose public figure cases and, with it, three decades of settled First Amendment jurisprudence.

II. BY REASON OF THE FIRST CIRCUIT'S FACTUAL FINDING THAT GRAY REMAINED A PUBLIC FIGURE AT THE CENTER OF AN ONGOING CONTROVERSY AT THE TIME OF THE BOOK'S PUBLICATION, THE LEGAL ISSUE OF WHETHER A PUBLIC FIGURE'S STATUS SHOULD LAPSE AFTER A PROLONGED PERIOD OF OBSCURITY IS NOT PRESENTED FOR REVIEW

Petitioner also asks this Court to grant certiorari to determine whether public figure status (and the corresponding need to show actual malice) should lapse in those cases where a libel plaintiff is no longer in the public eye at the time of the challenged publication. Pet. at 13. Certiorari should be denied since Petitioner is seeking to have the Court address a hypothetical question that was not reached by the courts below and that is not presented by the record in this action. The First Circuit found that, on the facts of *this* case, Petitioner remained an active public figure involved in a current controversy at the time of the Book's publication in 1992 — a finding that obviated any need to address or reach the "passage of time" issue. The question is, therefore, not presented for review by this Court.

In his brief on appeal to the First Circuit, Petitioner argued that, even if he had been a limited purpose public figure through 1986, he was no longer "the focus of media attention" when the Book was published in 1992 and, therefore, had lost his public figure status. Plaintiff-Appellant's Brief at 27-29. Rejecting the factual premise of this argument, the First Circuit found that "prior to *and continuing up to the book's publication[,]* . . . a public controversy existed as to the methods and influence of lobbyists." Ct. App. Op. at 11a (emphasis added). In fact, when the Book was published in July 1992, the ongoing

controversy over lobbyists was one of the central issues in the 1992 presidential election, with Ross Perot's calls for curbs on lobbyists the centerpiece of his campaign.[19] The First Circuit further found that, far from receding into obscurity, "Gray was a central figure in this controversy" and that "numerous articles concerning Gray, his company, and Hill and Knowlton [were] published between 1986 and 1992." Ct. App. Op. at 12a and n.3.[20] The record revealed no fewer than 188 articles mentioning or quoting Gray between 1986 and 1992, including, for example, a January 1992 *Newsweek* article in which Gray publicly touted the integrity of his company's billing practices — the *very* subject of Statement (c).[21] Because the First Circuit rejected Petitioner's contention that he was no longer in the public eye at the time of the Book's publication, the court did not reach (or express any view on) the legal question of whether — if Petitioner had been out of the limelight after 1986 — the passage of time would have caused his limited public figure status to lapse.

In his Petition, Gray does not challenge the First Circuit's factual determination that he remained at the center of an ongoing public controversy in 1992, perhaps because he realizes that certiorari is "rarely granted when the asserted error consists of erroneous factual findings."

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19. *See* A 16, Docket No. 100, Reply Affidavit of William Chapman, dated August 6, 1997, Exs. A, B, C and D.

20. Similarly, the Book itself reported on several well-publicized controversies involving Petitioner and his companies between 1986 and 1992, including, for example, Petitioner's lobbying and public relations efforts on behalf of the Kuwaiti Government in 1990 just prior to the Gulf War. Book at 327-394.

21. A 454, *Newsweek*, Jan. 13, 1992 ("I'd have the best employee's head if I found him dumping hours on a client with no work").

Supreme Court Rule 10. Rather, in what amounts to a request for an advisory ruling, he seeks certiorari on the "passage of time" issue to "resolve an unsettled area of law." Pet. at 17. Just as it was unnecessary for the First Circuit to reach this legal issue in light of its factual finding that Gray remained in the spotlight in 1992, it is equally unnecessary for this Court to decide in *this* case whether there is a temporal component to the limited public figure analysis. In *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 166 (1979), for example, this Court specifically declined to address whether a public figure "may lose that status by the passage of time" in light of its determination that the plaintiff had never been a public figure in the first place. The factual situation presented here is the opposite of *Wolston*, but the same reasoning applies: because Petitioner was a "central figure" in a public controversy that continued "up to the book's publication" (Ct. App. Op. at 12a, 11a), this Court need not and should not address the question of whether a public figure may lose that status where — unlike here — he has lapsed into obscurity.

Not only did the First Circuit not reach the issue of whether a "public figure temporal component" exists, it gave no indication of how it might rule were the issue squarely before it.[22] The absence of any legal analysis on the "temporal component" issue by the First Circuit provides a further reason to deny certiorari, namely, the issue is not "sufficiently developed" in this case for this Court to "assess" it. *Roberts v. Galen of Va.*, 525 U.S. 249, 252 (1999) (declining to address respondent's alternative grounds for affirmance because "these claims do not appear

22. While Petitioner seems to assume that the First Circuit would not recognize a "temporal component" to the limited public figure analysis, a recent First Circuit opinion suggested, without deciding, that "there may be a temporal dimension" in some circumstances. *Pendleton v. City of Haverhill*, 156 F.3d 57, 70 (1st Cir. 1998).

to have been sufficiently developed below for us to assess them"); *see also National Colegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999) (declining to "decide in the first instance issues not decided below" even though respondent had raised the issues in its Third Circuit brief).[23]

Finally, even if it were true — as it is not — that Petitioner had faded into obscurity after 1986, the facts of this case provide a particularly inappropriate basis for this Court to address the issue of whether there should be a temporal component to the limited purpose public figure analysis. Even under Petitioner's version of the facts, only six years would have passed between 1986 and the publication of the Book in 1992. This is far less than the 16-year gap in *Wolston* that led the two concurring Justices to endorse the passage-of-time argument, let alone the 40-year gap in *Street v. National Broadcasting Co.*, 645 F.2d 1227 (6th Cir. 1981). But more importantly, the record establishes that Petitioner continued to have effective and easy access to the media after 1986 and continued to assume the risk of public scrutiny by repeatedly granting press interviews and aggressively defending the role of lobbyists. A 360-373. This is not the situation addressed in the *Wolston* concurrence that emphasized the plaintiff's "conscious efforts to regain anonymity during the succeeding 16 years." *Wolston*, 443 U.S. at 171 (Blackmun, J., concurring). Even if this Court wished to address the legal question of whether a public figure loses that status by the passage of time, the

23. Although the "passage of time" question is not presented for review in this case, Respondents believe that once a person is classified as a limited purpose public figure in connection with a controversy, public figure status should continue for future discussion of that controversy so as to protect later commentary on the very events that made the person a public figure. "The press needs sufficient breathing room to compose the first rough draft of history and the historian needs the same protections when he writes the second or third draft." *Street v. National Broadcasting Co.*, 645 F.2d 1227, 1236 (6th Cir. 1981).

appropriate context for doing so would be a case in which a public figure has, in fact, gone into a prolonged period of obscurity prior to the time of the challenged publication. This is not that case.

III. PETITIONER'S ASSERTION THAT THE FIRST CIRCUIT MISAPPLIED A PROPERLY STATED RULE OF LAW TO STATEMENT (b) DOES NOT WARRANT CERTIORARI AND, IN ANY EVENT, IS WITHOUT MERIT

Petitioner finally contends that certiorari should be granted to review the First Circuit's determination that Statement (b) was not provably false, claiming that the First Circuit misapplied the rule set forth in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). Pet. at 17-21.[24] Petitioner seeks certiorari *solely* on the ground that, while the First Circuit stated the correct rule of law, it misapplied that rule to the facts of this case. Pet. at 20. This argument does not warrant review because certiorari is "rarely granted when the asserted error consists of the misapplication of a properly stated rule of law." Supreme Court Rule 10. Additionally, even beyond this prudential restriction on the Court's jurisdiction, certiorari should be denied since the record shows that the First Circuit properly applied *Milkovich* in concluding that Statement (b) was not provably false.

Petitioner concedes that, in analyzing Statement (b), the First Circuit correctly stated the rule laid down by *Milkovich:* "that only statements that present or imply the existence of facts that can be proven true or false are actionable under state defamation law." Ct. App. Op. at 4a (citing *Milkovich*, 497 U.S. at 18-20); Pet. at 18. Petitioner further acknowledges that, in making the determination of whether Statement (b) "can be proven true or false," the First Circuit correctly

24. Statement (b) reads: "A senior Gray and Company executive insisted that Gray's closeness to the President and others was often faked. 'He completely faked his closeness with a number of senior administration officials.' " Pet. at 18a.

"recognized" that *Milkovich* required the court to "evaluate the tenor of the speaker's statement and the overall context in which it was given." Pet. at 20, 4.

Nevertheless, Petitioner contends that "both the lower courts parsed Statement (b) to isolate two words contained in it, and ignored Statement (b)'s overall tenor and context." Pet. at 20. Petitioner claims that the First Circuit did not consider Statement (b) in the context of "Chapter 8 of the Book, which details facts concerning the start up of Gray & Co. and the social aspects of the business." *Id.*

Petitioner's contentions are without foundation. The First Circuit carefully weighed both the tenor and context of Statement (b) in its analysis of whether that passage contained a statement of objectively verifiable fact.

As mandated by *Milkovich*, the First Circuit expressly considered the tenor of Statement (b), namely, whether "it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture or surmise, rather than claiming to be in possession of objectively verifiable facts." Ct. App. Op. at 5a (quoting *Haynes v. Alfred A. Knopf*, 8 F.3d 1222, 1227 (7th Cir. 1993)).

It is equally clear that, contrary to Petitioner's assertion, the First Circuit did, in fact, examine Statement (b) within the context of both Chapter 8 — which detailed Petitioner's friendship with many senior officials in the Reagan administration — as well as the rest of the Book. The First Circuit explicitly stated that whether "calling something a 'fake' is or is not protected opinion depends very much on what is meant and therefore on context." Ct. App. Op. at 6a. The First Circuit then went on to examine the various meanings of "fake," noting that it can be an assertion of fact or opinion depending on the setting in which it is used. *Id.* Based on its careful analysis of both the tenor and context of Statement (b), the First Circuit correctly concluded that Statement (b) could not be read as

a factual assertion that Petitioner "did not in fact know" President Reagan or other high administration officials. *Id.* Rather, "the book made quite clear that Gray did have contacts at the highest levels; the word 'fake' was used to imply that Gray was exaggerating his 'closeness.' " *Id.*[25] Accordingly, the First Circuit held that Statement (b) was merely the speaker's subjective view that Petitioner tended to overemphasize the *degree* of his "closeness" with President Reagan and others, a "subjective judgment" the court properly held was too "vague" to be capable of verification. *Id.* Indeed, Chapter 8 contains differing opinions from at least four or five lobbyists and White House officials regarding how "close" Gray was with the President and his top advisors. Book at 153-157.[26]

Given that the First Circuit stated the correct rule of law in faithfully following *Milkovich* and properly applied that rule of law to Statement (b), there is no justification for granting certiorari.

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25. Less than two pages before Statement (b), Trento wrote in Chapter 8 that "Gray was friends with Ronald Reagan, Ed Meese, Cap Weinberger, Richard Schweiker, Charles Wick and others in the administration." Book at 154. She then went on to describe Petitioner's friendly relations with each of several senior Reagan administration officials. Additional details about Petitioner's personal friendship with President Reagan, Ed Meese, William Casey (then head of the CIA) and other top level officials were also provided elsewhere in the Book. *E.g.*, Book at 30, 68, 134-35, 168, 177, 340-46 (describing Gray's 25 year relationship with President Reagan).

26. The lower courts' conclusion, that, in context, Statement (b) was not an objectively verifiable statement of fact can be contrasted with the district court's holding that Statement (d) (Gray "fabricated" calls with White House officials to impress visitors) must go to the jury as a statement of fact. Whether Gray fabricated non-existent calls with White House officials is capable of being proven true or false; whether Gray overemphasized how "close" he was with those officials is not and, indeed, is inherently subjective.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

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